TAN CHONG KEAN v. YEOH TAI CHUAN & ANOR

FEDERAL COURT, PUTRAJAYA
RICHARD MALANJUM CJ (SABAH & SARAWAK)
ZAINUN ALI FCJ
AZAHAR MOHAMED FCJ
AZIAH ALI FCJ
PRASAD SANDOSHAM ABRAHAM FCJ
[APPEAL NO: 02(f)-77-10-2016 (P)]
18 DECEMBER 2017

LEGAL PROFESSION: *Professional privilege – Communications between solicitor and client – Client executed trust deed with third party to take over management and control of company in event of incompletion of land development – Condition that trust deed be destroyed by solicitor upon completion of development – Solicitors exhibited trust deed in suit where client was made third party – Whether there was breach of legal professional privilege by solicitors – Whether gave rise to client's cause of action against solicitor to obtain injunction to restrain any disclosure of confidential information – Whether solicitor sued in personal capacity for debt could rely on confidential information as defence to debt – Whether sufficient for client to plead breach without disclosing contents of privileged document – Evidence Act 1950, ss. 126 & 128*

EVIDENCE: *Privilege – Legal professional privilege – Communications between solicitor and client – Client executed trust deed with third party to take over management and control of company in event of incompletion of land development – Condition that trust deed be destroyed by solicitor upon completion of development – Solicitors exhibited trust deed in suit where client was made third party – Whether solicitor sued in personal capacity for debt could rely on confidential information as defence to debt – Whether sufficient for client to plead breach without disclosing contents of privileged document – Evidence Act 1950, ss. 126 & 128*

The appellant ('the plaintiff') was a shareholder of Pan Palace Holdings Sdn Bhd which owned a piece of land. Bukit Gambier Land Sdn Bhd ('BG') agreed to develop the said land by way of a joint venture. To ensure that he would not lose the land in case BG failed to carry out the development, the plaintiff's solicitor, the first respondent ('the first defendant'), advised the plaintiff to execute trust deeds with the shareholders of BG, with the plaintiff as the beneficiary. It was also a condition between the plaintiff and the respondents ('the defendants') that the trust deeds would be destroyed upon completion of the development. The land was successfully developed by BG and the plaintiff was under the impression that the defendants had destroyed the trust deeds. Arising from a dispute on payment of fees, BG sued the defendants at the Sessions Court. The defendants disputed the claim and applied for a third party notice to be issued to the plaintiff in relation to the unpaid legal fees, including the fees for preparing the trust deeds. Relying on s. 126 of the Evidence Act 1950 ('the Act'), the defendants argued that there

was no issue of breach of confidentiality since it was the plaintiff who first disclosed the existence of the trust deeds in another court case ('the Magistrate's Court's case'). As such, it was contended that there was already an express or implied waiver by the plaintiff in respect of the trust deeds. The High Court found in favour of the plaintiff but the decision was reversed by the Court of Appeal. Hence, the present appeal. The issues that arose for the court's adjudication were (i) whether a breach of s. 126 of the Act on legal professional privilege by a solicitor gives rise to a cause of action against him by the client to obtain an injunction to restrain any disclosure of confidential information by him or whether the client is confined to a complaint to the Advocates and Solicitors Disciplinary Board for breach of solicitor-client privilege ('question 1'); (ii) whether a solicitor sued in his personal capacity for a debt could rely on confidential information, reposed in him in his capacity as solicitor, as a defence to the debt ('question 2'); (iii) whether for the purposes of an action in court for breach of solicitor/client privilege, it is sufficient for the client to plead the breach without disclosing the contents of the privileged document ('question 3'); and (iv) whether s. 126 of the Act, by the use of the words 'unless with the client's express consent' rejects the concept of an implied waiver at common law ('question 4').

Held (allowing appeal; setting aside orders of Court of Appeal)
Per Richard Malanjum CJ (Sabah & Sarawak) delivering the judgment of the court:

(1) There was a clear violation by the defendants of the prohibition stipulated in s. 126 of the Act. The defendants disclosed the existence of the trust deeds without obtaining an express consent from the plaintiff. The copies the defendants kept were used when all should have been destroyed upon the successful completion of the development in the said land. Moreover, the defendants utilised the trust deeds for their own advantage. They used them to seek for indemnity from the plaintiff by way of a third party notice application in relation to a monetary claim made against them by BG. The claim by the defendants that there was no disclosure of the trust deeds to a third party was also contrary to the fact that indeed those documents were used and filed in court in relation to the application by the defendants for third party notice. (paras 34-36)

(2) Section 126 of the Act is not a mere rule of evidence. It is a principle of fundamental justice. Surely a breach of such principle entitles an aggrieved party to commence an action including a prayer for an injunction to safeguard the confidentiality of the client-solicitor communication. It is even more critical when such confidential communication is used to the advantage of the solicitors who are legally obliged to protect it. If the plaintiff had disclosed the contents of the trust deeds in his pleadings, it would have been construed as him having

abandoned his privilege. Therefore, it was sufficient that the plaintiff merely mentioned in his pleadings those documents in which he claimed to be covered by client's legal privilege. (paras 38 & 40)

(3) Section 126 of the Act dictates that an express consent must be given by a client before the client legal privilege is considered waived. There was no evidence to show that the plaintiff gave a clear consent which tantamounts to an express consent for the trust deeds to be disclosed. Hence, the condition precedent as stipulated in s. 126 was never met. The defendants' reliance on implied consent under s. 128 of the Act was also without any merit and misconceived. An implied consent has to be 'inferred from one's conduct rather than from one's direct expression'. (paras 43-45 & 47)

(4) There are two limbs in s. 128 of the Act. The defendants relied on the second limb, that is, '… if any party to a suit or proceeding calls any such advocate as a witness, he shall be deemed to have consented to the disclosure, only if he questions the advocate on matters which but for such question he would not be at liberty to disclose.' In the second limb, there are also conditions precedent, namely (i) the client must be the party calling the advocate as a witness in a suit or proceeding; and (ii) the client 'questions the advocate on matters which but for such question he would not be at liberty to disclose'. In the Magistrate's Court case the plaintiff did not call the first defendant as a witness. Thus, even the first condition precedent was not satisfied and although the first defendant was cross-examined, it was not within the ambit of the second limb of s. 128 of the Act. (paras 47 & 48)

(5) The first part of question 1 was answered in the affirmative while the second part was answered in the negative. Question 2 was answered in the negative. Questions 3 and 4 were answered in the affirmative. The defendants were restrained from disclosure and use of the trust deeds in their possession. All copies of the trust deeds in the defendants' possession were to be delivered to the plaintiff and the defendants were not to retain any facsimile or photocopy of the trust deeds. (paras 52 & 53)

Bahasa Malaysia *Headnotes*

Perayu ('plaintif') adalah pemegang saham Pan Palace Holdings Sdn Bhd yang memiliki sebidang tanah. Bukit Gambier Land Sdn Bhd ('BG') bersetuju membangunkan tanah tersebut melalui satu usaha sama. Untuk memastikan dia tidak kehilangan tanah tersebut jika BG gagal menjalankan pembangunan, peguam cara plaintif, responden pertama ('defendan pertama'), menasihati plaintif agar memeterai surat-surat ikatan amanah dengan pemegang-pemegang saham BG, dengan plaintif sebagai benefisiari. Turut disyaratkan antara plaintif dan responden-responden ('defendan-defendan') bahawa surat-surat ikatan amanah ini akan dilupuskan apabila

pembangunan telah disempurnakan. Tanah tersebut berjaya dibangunkan oleh BG dan plaintif menyangkakan defendan-defendan telah memusnahkan surat-surat ikatan amanah tersebut. Susulan pertikaian berkenaan bayaran yuran, BG memulakan tindakan terhadap defendan-defendan di Mahkamah Sesyen. Defendan-defendan membantah tuntutan tersebut dan memohon notis pihak ketiga dikeluarkan terhadap plaintif bagi yuran guaman yang tidak berbayar, termasuk yuran menyediakan surat-surat ikatan amanah. Bersandar pada s. 126 Akta Keterangan 1950 ('Akta'), defendan-defendan menghujahkan bahawa tiada isu pemecahan kerahsiaan kerana plaintif yang terlebih dahulu mendedahkan kewujudan surat-surat ikatan amanah ini dalam satu lagi kes mahkamah ('kes Mahkamah Majistret'). Oleh itu, dihujahkan bahawa wujud penepian nyata atau tersirat oleh plaintif bagi surat-surat ikatan amanah. Mahkamah Tinggi memutuskan berpihak pada plaintif tetapi keputusan ini diakas oleh Mahkamah Rayuan. Maka timbul rayuan ini. Isu-isu yang timbul bagi pemutusan mahkamah adalah (i) sama ada pelanggaran s. 126 Akta tentang keistimewaan profesional bawah undang-undang oleh peguam cara membangkitkan kausa tindakan terhadap peguam cara oleh klien untuk memperoleh injunksi menahan apa-apa pendedahan maklumat rahsia oleh peguam cara tersebut atau sama ada klien tersebut terhad untuk mengadu pada Lembaga Tatatertib Peguam Cara dan Peguam Bela bagi pelanggaran keistimewaan peguam cara-klien ('soalan 1'); (ii) sama ada peguam cara yang disaman dalam kapasiti peribadinya bagi hutang boleh bersandar pada maklumat rahsia, yang diberitahu padanya dalam kapasitinya sebagai peguam cara, sebagai pembelaan terhadap hutang tersebut ('soalan 2'); (iii) sama ada bagi maksud tindakan di mahkamah berkenaan pelanggaran keistimewaan peguam cara-klien, cukup buat klien memplidkan pelanggaran tanpa mendedahkan kandungan dokumen istimewa ('soalan 3'); dan (iv) sama ada s. 126 Akta, melalui penggunaan perkataan 'melainkan jika dengan persetujuan nyata kliennya' menolak konsep penepian tersirat bawah common law ('soalan 4').

Diputuskan (membenarkan rayuan; mengetepikan perintah-perintah Mahkamah Rayuan)

Oleh Richard Malanjum HB (Sabah & Sarawak) menyampaikan penghakiman mahkamah:

(1) Terdapat pelanggaran nyata oleh defendan-defendan terhadap larangan bawah s. 126 Akta. Defendan-defendan mendedahkan kewujudan surat-surat ikatan amanah tanpa memperoleh persetujuan nyata plaintif. Salinan-salinan yang defendan-defendan simpan digunakan sedangkan kesemuanya sepatutnya dilupuskan apabila pembangunan tanah berjaya disempurnakan. Tambahan pula, defendan-defendan menggunakan surat-surat ikatan amanah tersebut bagi manfaat mereka sendiri. Mereka menggunakan kesemuanya untuk mendapatkan indemniti daripada plaintif melalui permohonan notis pihak ketiga bagi tuntutan kewangan yang dibuat terhadap mereka oleh BG. Tuntutan defendan-defendan

bahawa tiada pendedahan surat-surat ikatan amanah juga bertentangan dengan fakta bahawa dokumen-dokumen tersebut sememangnya diguna dan difailkan bagi permohonan notis pihak ketiga oleh defendan-defendan.

(2) Seksyen 126 Akta bukan sekadar peraturan keterangan. Ini adalah prinsip asas keadilan. Tentunya pelanggaran prinsip sedemikian melayakkan pihak terkilan memulakan tindakan, termasuk permohonan injunksi, untuk melindungi kerahsiaan komunikasi klien-peguam cara. Ini lebih kritikal lagi apabila komunikasi kerahsiaan sedemikian diguna bagi manfaat peguam-peguam cara yang berkewajipan, bawah undang-undang, untuk lindungi. Jika plaintif mendedahkan isi kandungan surat-surat ikatan amanah tersebut dalam plidingnya, ini mungkin ditafsir sebagai dia mengabaikan keistimewaannya. Oleh itu, cukup jika plaintif sekadar menyebut dalam plidingnya akan dokumen-dokumen tersebut yang dikatakan dilindungi oleh keistimewaan klien bawah undang-undang.

(3) Seksyen 126 menetapkan bahawa persetujuan nyata mesti diberi oleh klien sebelum keistimewaan klien bawah undang-undang dianggap diketepikan. Tiada keterangan yang menunjukkan plaintif memberi kebenaran nyata yang terjumlah sebagai kebenaran nyata agar surat-surat ikatan amanah tersebut didedahkan. Oleh itu, syarat terdahulu yang dinyatakan bawah s. 126 tidak dipenuhi. Sandaran defendan pada kebenaran tersirat bawah s. 128 Akta juga tidak bermerit dan satu salah tanggapan. Kebenaran tersirat mestilah 'disiratkan berdasarkan tindakan seseorang dan bukan penzahiran nyata seseorang'.

(4) Terdapat dua cabang bawah s. 128 Akta. Defendan-defendan bersandar pada cabang kedua iaitu 'jika mana-mana pihak dalam guaman atau prosiding memanggil mana-mana peguam bela itu sebagai saksi, dia hendaklah disifatkan telah bersetuju terhadap penzahiran itu hanya jika dia menyoal peguam bela itu mengenai perkara yang, jika tidak kerana soalan itu, peguam bela itu tidak bebas menzahirkannya'. Dalam cabang kedua, terdapat syarat-syarat terdahulu iaitu (i) klien mestilah pihak yang memanggil peguam cara sebagai saksi dalam guaman atau prosiding; dan (ii) klien menyoal peguam bela mengenai perkara yang, jika tidak kerana soalan itu, peguam bela itu tidak bebas menzahirkannya'. Dalam kes Mahkamah Majistret, plaintif tidak memanggil defendan pertama sebagai saksi. Oleh itu, syarat terdahulu yang pertama tidak dipenuhi dan walaupun defendan pertama diperiksa balas, ini bukan dalam lingkungan cabang kedua s. 128 Akta.

(5) Bahagian pertama soalan 1 dijawab secara afirmatif manakala bahagian kedua dijawab secara negatif. Soalan 2 dijawab secara negatif. Soalan 3 dan 4 dijawab secara afirmatif. Defendan-defendan disekat daripada mendedahkan dan menggunakan surat-surat ikatan amanah dalam

A milikan mereka. Kesemua salinan surat-surat ikatan amanah dalam milikan defendan-defendan hendaklah diserahkan kepada plaintif dan defendan-defendan tidak boleh menyimpan faksimili atau fotokopi surat-surat ikatan amanah tersebut.

B **Case(s) referred to:**
B v. Auckland District Law Society (2003) 2 AC 736 ***(refd)***
Berd v. Lovelace (1576) 21 ER 33 (E) ***(refd)***
Buttes Gas and Oil v. Hammer (No. 3) (1981) QB 223 ***(refd)***
Canada (Attorney General) v. Federation of Law Societies of Canada, 2015 SCC 7 ***(refd)***
Dato' Anthony See Teow Guan v. See Teow Chuan & Anor [2009] 3 CLJ 405 FC ***(refd)***
C *Dato' Au Ba Chi & Ors v. Koh Keng Kheng & Ors [1988] 1 LNS 188 HC* ***(refd)***
Expandable Limited & Anor v. Rubin [2008] EWCA Civ 59 ***(refd)***
Gelatissimo Ventures Pte Ltd v. Singapore Flyer Pte Ltd [2010] 1 SLR 833 ***(refd)***
Goddard v. Nationwide Building Society [1987] 1 QB 670 ***(refd)***
Goldberg v. Ng [1995] 185 CLR 83 ***(refd)***
Lee Wah Cane Furniture Pte Ltd, In The Matter Of [1984] 1 CLJ 128; [1984] 2 CLJ
D *(Rep) 670 HC* ***(refd)***
Lord Ashburton v. Pape [1913] 2 Ch 469 ***(refd)***
Low Chi Yong v. Low Chi Hong & Anor [2018] 1 CLJ 287 FC ***(refd)***
R v. Secretary of State for the Home Department, ex p Leech [1994] QB 198 ***(refd)***
Re International Power Industries [1985] BCLC 128 ***(refd)***
Tentat Singapore Pte Ltd v. Multiple Grantie Pte Ltd [2009] 1 SLR 42 ***(refd)***
E *Yeoh Ah Tee v. Lee Chuan Meow [1962] 1 LNS 210 PC* ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 126, 128

Other source(s) referred to:
Sarkar's Law of Evidence, Malaysian Edition, (2016) vol 3, p 3210

F
For the appellant - Cyrus Das & Raj Shankar; M/s Kumar & Co
For the respondents - Muhammad Shafee Abdullah, Wan Aizuddin Wan Mohammed & S Abishaya; M/s Shafee & Co

[Editor's note: For the Court of Appeal judgment, please see Yeoh Tai Chuan & Anor
G *v. Tan Chong Kean [2016] 4 CLJ 265 (overruled).]*

Reported by Najib Tamby

JUDGMENT

H **Richard Malanjum CJ (Sabah & Sarawak):**

Introduction

[1] This appeal deals with one but an important issue, that is, the scope of solicitor-client professional privilege as stipulated in s. 126 and s. 128 of
I the Evidence Act 1950 ('s. 126' and 's. 128' respectively).

[2] On 11 October 2016, this court granted leave to appeal on the following questions:

(i) 'Whether a breach of s. 126 of the Evidence Act 1950 on legal professional privilege by a solicitor gives rise to a cause of action against him by the client to obtain an injunction to restrain any disclosure of confidential information by him or whether, as stated by the Court of Appeal, the client is confined to a complaint to the Advocates and Solicitors Disciplinary Board for breach of solicitor-client privilege?

(ii) Whether a solicitor sued in his personal capacity for a debt could rely on confidential information reposed in him in his capacity as solicitor as a defence to the debt?

(iii) Whether for the purposes of an action in court for breach of solicitor-client privilege it is sufficient for the client to plead the breach without disclosing the contents of the privileged document?

(iv) Whether s. 126 by the use of the words 'unless with the client's express consent' rejects the concept of an implied waiver at common law?'

[3] In this judgment, unless otherwise stated the appellant is referred to as the plaintiff while the two respondents as the defendants collectively or the first and second defendant respectively.

[4] The plaintiff commenced an action against the defendants who were sued as partners in the legal firm of Messrs TC Yeoh & Co ('the legal firm') alleging breach of their responsibility as solicitors under s. 126. The High Court decided in favour of the plaintiff but the Court of Appeal reversed that decision. Hence this appeal before this court.

[5] We heard the appeal on 12 July 2017 and 30 August 2017 and reserved our judgment. This is the unanimous judgment of the court.

Background Facts

[6] The plaintiff was a shareholder of a company, Pan Palace Holdings Sdn. Bhd., the registered owner of a piece of land situated at Sungai Dua, Penang ('the said land'). The plaintiff wanted to develop the said land. A company, Bukit Gambier Land Sdn Bhd ('Bukit Gambier') whose shareholders were Chow Yu Teck ('Chow'), Lim Kim Huat ('Lim') and Cheong Ho Kuan ('Cheong') agreed to undertake the development by way of a joint venture. The development project was known as Pan Palace Plaza.

[7] In order to ensure that he would not lose the said land in case Bukit Gambier failed to carry out the development, the plaintiff was advised by the first defendant to get the shareholders of Bukit Gambier execute three trust deeds ('the trust deeds') with the plaintiff as the beneficiary. The advice was followed and the legal firm prepared the documents and had them duly executed. Legal fee in the preparation was charged to the plaintiff.

[8] It was agreed between the plaintiff and the legal firm that upon the successful completion of the development, the trust deeds would be destroyed.

[9] Bukit Gambier successfully developed the said land and the plaintiff assumed that all copies of the trust deeds were destroyed.

[10] The defendants purchased one unit of shop-house in Pan Palace Plaza at the purchase price of RM605,000 ('the purchase price'). The defendants financed it by way of 80% bank loan and the balance of RM121,000 ('the said sum') was payable by them.

[11] Apart from preparing the trust deeds, the legal firm had done other legal works for the plaintiff and the total legal fees came up to RM183,050.

[12] The defendants did not pay the said sum. Bukit Gambier therefore commenced an action in the Sessions Court in Georgetown, Penang to recover the said sum.

[13] The defendants disputed the claim and also applied for a third party notice to issue to the plaintiff in relation to the unpaid legal fees including the fee for preparing the trust deeds. It was in relation to the third party notice and the reference to the trust deeds that this present suit was filed relying on s. 126.

[14] Basically, the defendants denied any breach of s. 126. They averred that there was no issue of breach of confidentiality since it was the plaintiff who first disclosed the existence of the trust deeds in another court case before the Magistrate's Court in Penang (*vide* summons no. 72-33672009) ('the Magistrate's Court case'). As such, it was contended that there was already an express or implied waiver made by the plaintiff in respect of the trust deeds.

Before The High Court

[15] In relation to s. 126 this is what the High Court said, *inter alia*:

> The Defendants had used this information for their own benefit. The Defendants tried to escape liability to pay the balance purchased price as claimed by Bukit Gambier.
>
> To my mind, the Defendants owed a professional duty to preserve the confidential information imparted during the subsistence and after the relationship. The Trust Deeds were generated during the solicitor-client relationship between the Plaintiff and the Defendants.
>
> The Plaintiff' had clearly expressed that he refuses to answer whether there is a trust deed because of the solicitor - client privilege. I do not see how the Plaintiff had waived his right to privilege.
>
> In my view, the Plaintiff did come to Court with clean hands when he applied for an injunction. The Defendants are the ones who had misused the confidential information which they kept and had as solicitors for the Plaintiff.

[16] Hence, the High Court found in favour of the plaintiff and made the following orders:

> In the circumstances, the Plaintiff's claim is allowed with cost of RM30,000.00. For exemplary damages, I am awarding RM50,000.00 as a reminder to the Defendants that they should not breach their fiduciary duty and professional duty as stated in section 126 of the Evidence. Act 1950. I am also awarding general damages which is to be assessed before the Registrar. Interest of 5% on general damages after assessment of damages by the Registrar. No interest as to the exemplary damages.

Before The Court Of Appeal

[17] In reversing the judgment of the High Court the Court of Appeal said these, *inter alia*:

> [3] We have perused the statement of claim several times but were not able to find any statement in the pleading which can sustain a cause of action under section 126 of the Evidence Act 1950. A claim for confidential information is different from the protection given to client and solicitors under section 126 of the Evidence Act 1950. The difference is not even like of an apple to an orange but the distinction is that of a rock and a fruit. Breach of confidential information can form a cause of action. However, we were doubtful whether section 126 of the Evidence Act 1950 can give rise to a cause of action. On the date of hearing, we found the submission was not satisfactory and directed parties to submit further, on this issue.
>
> [4] At the outset we must say that the Evidence Act 1950 (EA 1950) is a procedural law related to trial in this country. As a general rule, a breach of any of the sections under the Evidence Act will not give rise to a cause of action *per se*. Section 126 is meant to be a protection given to the solicitors not to disclose information between solicitors and clients as stated in the section to third parties and not among themselves. It has nothing to do with confidential information or the definition or jurisprudence thereof.
>
> [5] ...
>
> The phrase, "No advocate shall at any time be permitted", clearly shows that a solicitor is not allowed to disclose any information relating to clients in the course of his professional employment without the client's consent. That is to say, a third party to the trial cannot force disclosure and/or the solicitor will be protected by the court to refuse disclosure. If not for the existence of section 126, solicitors may be liable for contempt if the courts order disclosure and the solicitors fail to do so or failure to disclose may trigger section 114(g) of EA 1950 which relates to adverse inference.
>
> [11] We have read the memorandum of appeal, the record of appeal and the able submission of the parties. After giving much consideration to the submission of the learned counsel for the defendants, we take the view that the appeal must be allowed. Our reasons *inter alia* are as follows:

A (i) We note that the plaintiff and the defendants were not parties to the Trust Deed and in consequence there could not be a cause of action for breach of confidential information *per se* as per the pleadings.

(ii) In our considered view, the learned High Court judge misdirected B herself in failing to appreciate the long line of authorities relating to 'confidential information' as well as pleading rules. The plaintiff's failure to plead the cause of action with the particulars on the face of record makes the suit *fait accompli*;

(iii) On the issue whether solicitor-client privilege under section 126 of C EA 1950 will apply for the plaintiff to anchor a cause of action, we were not appraised with a comprehensive submission on this issue despite the fact we have given parties time to submit. In our considered view, section 126 of EA 1950 will not entitle the plaintiff to anchor a cause of action. However, if a solicitor breached solicitor client privileges without the consent of the clients, it can be a subject D matter of complaint to the advocates' disciplinary board. The breach, if sufficiently serious, may result in the solicitors being struck out from the roll of advocate and solicitor. We do not wish to deal with the issue whether there can be a cause of action against a solicitor in the manner pleaded by the plaintiff for breach of solicitor-client privileges, save to say:

E (a) In the instant case, it involves a dispute between clients and solicitors and/or has nexus. In consequence, section 126 of EA 1950 will not be applicable. Support for the proposition is found in a number of cases and academic writings.

(iv) For a client to succeed in an action based on improper disclosure, F he must prove that he actually suffered injury. Pure disclosure itself does not entitle the clients to seek damages as per the old cases. [See *Taylor v. Blacklaw* 3 Bing NC 235]. In the instant case, there was no finding by the learned trial judge that the plaintiff had actually suffered damages which the plaintiff has quantified damages as RM100 million which on the face of record as well as the facts will G appear to be an abuse of process of court. The trial court on such facts at the case management stage itself should have inquired to determine whether indeed it was an abuse of the court process, if so, it must give the litigant notice to amend, failing which the suit should be struck out. Abuse of process is not a matter that the court should entertain. [See *Charles Forte Investment Ltd v. Amanda* [1963] H 1 Ch.D. 240].

(v) It is a wrong exercise of discretion for the trial court to order assessment of damages in the instant case when there was no finding that the plaintiff suffered injury. In addition, it will be a wrong exercise of discretion to order assessment of general damages I only before the Registrar when parties have not requested the court to deal with liability only. Even if parties had requested the court

to deal with the issue of liability only, unless they intend to settle the matter amicably on the issue of quantum, the court is obliged to hear the issue as to liability as well as quantum. The issue of liability as well as quantum is part and parcel of the obligation of trial court.

Before This Court

Submissions Of Parties

[18] In his submission, learned counsel for the plaintiff dealt with the first two leave questions together. But before addressing them specifically, he made the following points, namely, that:

(a) there was no basis for the defendants to disclose the trust deeds since the claim against them personally was made by Bukit Gambier and not by the plaintiff;

(b) there was no piercing of veil of incorporation applied for in the action by Bukit Gambier against the defendants;

(c) the defendants could have sued for the legal fees allegedly owed by the plaintiff personally and which had nothing to do with Bukit Gambier;

(d) there was no nexus between the alleged legal fees and the balance of the purchase price of the unit bought by the defendants from Bukit Gambier. The defendants had therefore mixed their professional and private roles;

(e) the trust deeds were related to a collateral private arrangement between the owner of the said land and the shareholders of Bukit Gambier;

(f) the defendants in their capacity as solicitors were not entitled for any purpose to rely on any information obtained from their clients as solicitors. Any information obtained through solicitor-client relationship is privileged information to be treated as absolute unless there was an express waiver by their clients;

(g) the privilege is absolute and belongs to the client. It applies to the full unless there is fraud. And there is no issue of any enquiry to be held in balancing between the public interest in disclosure and the private rights of protection enjoyed by the client;

(h) the trust deeds were not pleaded by the defendants in their statement of defence in the action by Bukit Gambier;

(i) section 126 is a statutory protection given to a client and not to his or her solicitor; and

(j) the defendants are 'accountable for their admitted breach of s. 126 which is a mandatory obligation imposed on them as solicitors'.

[19] Specifically for leave questions 1 and 2, learned counsel submitted that:

(a) the Court of Appeal made a fundamental error in construing s. 126 as 'protections given to solicitors' when in law 'the privilege belongs to the client and not to his lawyer' citing the case of *B v. Auckland District Law Society* [2003] 2 AC 736 and *Sarkar's Law of Evidence* (Malaysian Edition) (2016) vol. 3 p. 3210;

(b) the principle of solicitor-client privilege or legal professional privilege is not 'merely as a shield against discovery but as affording the right to mount a cause of action to restrain its breach'. A 'breach of solicitor-client privilege by a solicitor or a third party is actionable by an injured client'. The cases cited are *Lord Ashburton v. Pape* [1913] 2 Ch 469; *B v. Auckland District Law Society (supra)*; *Dato' Au Ba Chi & Ors v. Koh Keng Kheng & Ors* [1988] 1 LNS 188; [1989] 3 MLJ 445; *Goddard v. Nationwide Building Society* [1987] 1 QB 670; *Tentat Singapore Pte Ltd v. Multiple Grantie Pte Ltd* [2009] 1 SLR 42; *Gelatissimo Ventures Pte Ltd v. Singapore Flyer Pte Ltd* [2010] 1 SLR 833;

(c) solicitor-client privilege or legal professional privilege is not a mere rule of evidence. 'It is a fundamental condition on which the administration of justice as a whole rests' citing the case of *B v. Auckland District Law Society (supra)*;

(d) 'a solicitor is not expected to abuse the information in his knowledge and part with it merely because he is summoned to do so' - *Lee Wah Cane Furniture Pte Ltd, In The Matter Of* [1984] 1 CLJ 128; [1984] 2 CLJ (Rep) 670; [1984] 1 MLJ 156;

(e) 'since the privilege belongs to the client, the lawyer cannot invoke it for his own benefit if the privilege is waived by the client' - *Re International Power Industries* [1985] BCLC 128 at p. 138; and

(f) 'in a case of blatant abuse of the privilege' by a solicitor 'for his own purpose in defending a claim against him in his personal capacity, it is a travesty of justice if the injured client is not able to take legal action to prevent the wrong being done'.

[20] In respect of leave question 3, learned counsel for the plaintiff submitted that:

(a) the plaintiff was wholly right in not pleading the contents of the trust deeds as he would then run the risk of express waiver of the privilege claimed - *Buttes Gas and Oil v. Hammer* (No. 3) [1981] 1 QB 223; and

(b) the Court of Appeal erred in 'equating solicitor-client privilege exclusively with confidentiality' and then erroneously 'applied the principles relating to the law of confidentiality to decide if the pleading was sufficient'.

[21] For leave question 4, learned counsel for the plaintiff argued that there could not have been any express waiver given because:

(a) it is an established principle that 'there could be no waiver of privilege except with the express consent of the client. The doctrine of implied waiver at common law is not statutorily recognised under s. 126' - *Dato' Anthony See Teow Guan v. See Teow Chuan & Anor* [2009] 3 CLJ 405; [2009] 3 MLJ 14;

(b) section 128 (second limb) of the Evidence Act 1950 does not apply in this case since the client has not called upon the solicitor to give evidence. As such implied waiver does not arise;

(c) the Court of Appeal misread the Magistrate's Court case notes of proceedings where it was clearly recorded the plaintiff refused to answer a question on a trust deed on the ground of solicitor-client privilege. Further, the issue of legal fees has nothing to do with the contents of the trust deeds;

(d) the Court of Appeal failed to invoke or apply s. 128 of the Evidence Act 1950 where it is stated expressly that 'If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in s. 126'; and

(e) in mere one sentence the Court of Appeal ruled that there was a waiver by the plaintiff of the solicitor-client privilege.

[22] In response to the above, learned counsel for the defendants submitted that:

(a) the plaintiff and the defendants were in a solicitor-client relationship. But the plaintiff 'is seeking to prevent' the defendants from revealing the trust deeds 'that establish and/or prove' that the plaintiff 'had been lying and/or misleading the court in his claim' against the defendants. To allow him to do so would enable the plaintiff to unfairly profit using his lies;

(b) the trust deeds are already within the public domain. The plaintiff had expressly, deliberately and intentionally waived the privilege during the trial, as recorded in the Magistrate's Court's case notes of proceedings. There was no appeal. The trust deeds 'are revealed and open to the public as they are henceforth contained in public court records';

(c) 'by the third party proceedings in Sessions Court Summons No. 52-3367-2008, against which there is no pending appeal', the plaintiff 'did not raise confidentiality or privilege and the Penang High Court on 30 June 2010 in Appeal No 12A-270-2010, the trust deeds, 'are now within the public domain';

(d) there was non-disclosure of material facts by the plaintiff when he applied for interim injunction, namely, (i) the trust deeds were already included in the agreed bundle of documents in the preparation of trial in the Sessions Court and the plaintiff did not seek to have them removed during the injunction application in the High Court; (ii) the plaintiff was brought in as a third party for indemnity in relation to the trust deeds and Bukit Gambier; and (iii) that the plaintiff had deliberately and intentionally and expressly waived his privilege through his counsel in the Magistrate's Court case brought by the plaintiff against the defendants;

(e) having failed in his appeal before the High Court to set aside the third party notice which has connection with the trust deeds and Bukit Gambier, the plaintiff did not further appeal;

(f) the contents of the trust deeds do not meet the requirements of confidentiality. Further, the plaintiff had already intentionally and deliberately waived any confidentiality in those documents during the Magistrate's Court case between the same parties. As such the plaintiff is no longer entitled to rely on privileged communication;

(g) the plaintiff does not satisfy the necessary legal principles required to apply for injunction. The plaintiff has come to court with unclean hands having failed to disclose material facts and perjured including his witness Chow Yu Tek. As such the balance should be in favour of not granting the injunction applied for;

(h) section 126 does not give rise to a cause of action but may only provide for qualified defence;

(i) in respect to leave question 1 the 'Court of Appeal had rightly decided' that s. 126 does not give rise to an independent cause of action but merely entitled the plaintiff to complain before the Advocates and Solicitors Disciplinary Board. 'To date, there has been no case law and or authorities in support' of s. 126 being relied upon to mount a cause of action. It only 'gives rise to a qualified defence';

(j) for leave question 2 'the parties to the so-called confidential information are the same parties in this action hence there is no breach of so-called confidential information to third parties. As such the defendants by virtue of not being third parties should on a balance be entitled to disclose the so-called confidential information to court';

(k) for leave question 3 the 'failure and for omission and/or neglect' of the plaintiff 'in merely pleading the breach and in not disclosing the contents of the breach ie the privileged document goes against the laws governing pleadings';

(l) for leave question 4 it is not relevant in this appeal whether s. 126 rejects the concept of implied waiver at common law. The plaintiff had expressly given waiver when his counsel cross-examined the first defendant during the hearing in the Magistrate's Court case on matters which but for such question he 'would not be at liberty to disclose. The 'fact that the said trust deeds by virtue of being contained in court records automatically render them public domain';

(m) the Court of Appeal 'had rightly decided that s. 126 of the Evidence Act 1950 was a procedural privilege to be used as a shield and not a sword, ie not relied upon to mount a cause of action but rather as a qualified defence. The confidentiality exists for the protection of the information given by the client to the solicitor so that the solicitor cannot be compelled to reveal those confidential information that would be detrimental to his client, to third parties. The confidentiality is not for the purpose of allowing the client to perjure in order to gain benefit from his solicitor';

(n) the issue of the 'trust deeds as alleged' by the plaintiff as being privileged document protected by solicitor-client privilege or client confidentiality does not arise as the disclosure was not to third parties. As such there was no breach of s. 126; and

(o) the 'Court of Appeal had rightly held that the failure and/or omission and/or neglect' by the plaintiff in pleading or disclosing the contents of the trust deeds went against the laws governing pleadings.

Decision Of This Court

[23] Section 126 reads:

> (1) No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:
>
> Provided that nothing in this section shall protect from disclosure:
>
> (a) any such communication made in furtherance of any illegal purpose;
>
> (b) any fact observed by any advocate in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment.
>
> (2) It is immaterial whether the attention of the advocate was or was not directed to the fact by or on behalf of his client.
>
> Explanation - The obligation stated in this section continues after the employment has ceased.

[24] On plain reading of s. 126 it is clear that in order for it to apply the following prerequisites must be present, namely:

(a) there must exist a solicitor-client relationship between the parties; and

(b) there exist communication in any manner or of any subject made by the client to the solicitor in the course and for the purpose of the employment of the solicitor and/or advice given by the solicitor to the client.

[25] The privilege belongs to the client and not that of the solicitor. (See: *B v. Auckland District Law Society (supra)*). As such in Australia it is now statutorily called the 'client legal privilege' instead of 'legal professional privilege'. (See: Australia Evidence Act 1995 (Commonwealth). The solicitor is therefore legally obliged to protect not only any form of information he has obtained from the client but also all the advice he has given to the client.

[26] But the privilege may be waived only with the express consent given by the client. Further, the privilege does not cover any communication between the client and the solicitor that is for the furtherance of any illegal purpose or any fact tantamount to commission of fraud or crime as observed by the solicitor in the course of his employment.

[27] The principle in s. 126 was postulated centuries ago as an English common law principle in the case of *Berd v. Lovelace* (1576) 21 ER 33 (E) in which the full report reads:

> Thomas Hawtry, gentleman, was served with a subpoena to testify his knowledge touching the cause in variance; and made oath that he hath been, and yet is a solicitor in this suit, and hath received several fees of the defendant; which being informed to the Master of the Rolls, it is ordered that the said Thomas Hawtry shall not be compelled to be deposed, touching the same; and that he shall be in no danger of any contempt, touching the not executing of the same process.

[28] The rationale in the principle is to enable and protect an individual's ability to access to the justice system with complete disclosure of all necessary information to his legal adviser free from any hindrance in the form of fear that any disclosure by him of any communication may prejudice him in the future.

[29] The courts regard client legal privilege as a "substantive general principle which plays an important role in the effective and efficient administration of justice by the courts". (See: *Goldberg v. Ng* [1995] 185 CLR 83).

[30] In *R v. Secretary of State for the Home Department, ex p Leech* [1994] QB 198 Steyn LJ said this at p. 211:

> Legal professional privilege is therefore based on an important auxiliary principle which serves to buttress the cardinal principles of unimpeded access to the court and to legal advice. It is not without significance that

counsel could not refer us to a single instance where subordinate legislation was employed, let alone successfully employed, to abolish a common law privilege where the enabling legislation failed to authorise the abolition expressly.

[31] In the Canadian case of *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 SCR 401 the Supreme Court (per LeBel, Abella, Cromwell, Karakatsanis and Wagner JJ and delivered by Cromwell J) held that:

> Lawyers must keep their clients' confidences and act with commitment to serving and protecting their clients' legitimate interests. Both of these duties are essential to the due administration of justice.
>
> ...'The expectation of privacy in solicitor-client privileged communications is invariably high regardless of the context and nothing about the regulatory context of the Act or the fact that a regulatory agency undertakes the searches diminishes that expectation' ... 'Solicitor-client privilege must remain as close to absolute as possible. There must be a stringent norm to ensure protection and legislative provisions must interfere with the privilege no more than absolutely necessary.' .... 'It should be recognised as a principle of fundamental justice that the state cannot impose duties on lawyers that undermine their duty of commitment to their clients' causes. Principles of fundamental justice have three characteristics. They must be a legal principle; there must be significant societal consensus that they are fundamental to the way in which the legal system ought fairly to operate; and, they must be sufficiently precise so as to yield a manageable standard against which to measure deprivations of life, liberty or security of the person. The lawyer's duty of commitment to the client's cause meets this test. First, it is a normative legal principle and a basic tenet of our legal system. It has been recognised as a distinct element of a lawyer's broader common law duty of loyalty. Second, jurisprudence demonstrates that the principle is sufficiently precise to provide a workable standard. It does not countenance a lawyer's involvement in, or facilitation of, illegal activities and it is consistent with a lawyer taking appropriate steps to ensure that his or her services are not used for improper ends. Third, there is overwhelming evidence of a strong and wide-spread consensus concerning the fundamental importance in democratic states of protection against state interference with the lawyer's commitment to his or her client's cause. The duty is fundamental to the solicitor-client relationship and how the state and the citizen interact in legal matters. The lawyer's duty of commitment to the client's cause is essential to maintaining confidence in the integrity of the administration of justice.

[32] Nearer home in the Singapore case of *Re Lee Wah Cane Furniture Pte Ltd (supra)* cited by learned counsel for the plaintiff, the court acknowledged the sanctity of client legal privilege. It was held that in law a court order could not be sustained which compelled a solicitor to disclose or be examined on information obtained while acting for a client. A solicitor may assist in providing information which he has become acquainted in the course

of his professional employment so long as it is 'within his capacity and within the bounds of professional privilege' unless he has been expressly instructed or authorised by his client to do so.

[33] In the present case, there is no denial that the relationship between the plaintiff and the defendants at the material time was one of client-solicitor. It is also not in dispute that arising from that relationship and on the advice of the first defendant given when sought for by the plaintiff the trust deeds were prepared and executed. It was also the instruction of the plaintiff to the defendants and not denied that the trust deeds must remain confidential and to be destroyed upon the successful completion of the development of the said land by Bukit Gambier.

[34] Unfortunately, the defendants disclosed the existence of the trust deeds without obtaining an express consent from the plaintiff. The copies the defendants kept were used when all should have been destroyed upon the successful completion of the development in the said land.

[35] Moreover, the defendants utilised the trust deeds for their own advantage. They used them to seek for indemnity from the plaintiff by way of a third party notice application in relation to a monetary claim made against them by Bukit Gambier. The claim by the defendants that there was no disclosure of the trust deeds to a third party is also contrary to the fact that indeed those documents were used and filed in court in relation to application by the defendants for third party notice.

[36] Thus, in our view, there was a clear violation by the defendants of the prohibition stipulated in s. 126.

[37] The next issue is whether such a breach is actionable by an aggrieved client? In this case, the use and disclosure of the information was for the benefit of the defendants. Learned counsel for the defendants submitted that the plaintiff has no cause of action under s. 126. It merely enables him to lodge a complaint with the relevant disciplinary body.

[38] With respect, we are not inclined to agree with learned counsel for the defendants. Section 126 is not a mere rule of evidence. It is a principle of fundamental justice. Surely a breach of such principle entitles an aggrieved party to commence an action including a prayer for an injunction to safeguard the confidentiality of the client-solicitor communication. It is even more critical when such confidential communication is used to the advantage of the solicitors who are legally obliged to protect it. Hence, the principle of law as submitted by learned counsel for the plaintiff is the correct proposition of law on this issue.

[39] We are therefore of the view that the Court of Appeal erred in its finding on the foregoing issue.

[40] As regards the pleadings point, we find there is no merit in the submission of learned counsel for the defendants. If the plaintiff had disclosed the contents of the trust deeds in his pleadings, it would have been construed as him having abandoned his privilege. As such, it was sufficient that the plaintiff merely mentioned in his pleadings those documents in which he claimed to be covered by client legal privilege.

[41] In *Buttes Gas and Oil Co v. Hammer (No 3)* [1981] 1 QB 223 Donaldson LJ said this at p. 252 E-F:

> It must be right that a bare reference to a document in a pleading does not waive any privilege attaching to it as otherwise there would be no scope for taking objection under R.S.C., Ord. 24, r. 11(i), when a notice was served under rule 10(1). If, on the other hand, a document is reproduced in full in the pleading, its confidentiality is gone and no question of privilege could arise. Where the line is to be drawn between these two extremes may be a matter of some nicety, but I do not think that it is necessary to reach a conclusion in the present case which does not, in my judgment, turn on so narrow an issue as waiver in relation to the few documents which are referred to in the pleadings.

(See also: *Expandable Limited & Anor v. Rubin* [2008] EWCA Civ 59).

[42] On the issue of waiver, learned counsel for the defendants relied heavily on the Magistrate's Court case in particular on the cross-examination of the first defendant by counsel for the plaintiff in that proceeding. He submitted that it was an express waiver and if not, an implied waiver under s. 128.

[43] Section 126 dictates that an express consent must be given by a client before the client legal privilege is considered waived. In *Low Chi Yong v. Low Chi Hong & Anor* [2018] 1 CLJ 287; [2017] MLJU 1657 this court opined the meaning of express consent at para. 46 thus:

> *Black's Law Dictionary* (Edited by Bryana A Garner, Deluxe Ninth Edition) states that "consent" means "Agreement, approval, or permission as to some act or purpose, esp. given voluntarily by a competent person; legally effective assent. "Express consent" means "Consent that is clearly and unmistakably stated" whereas "Implied consent" means "Consent inferred from one's conduct rather than from one's direct expression. Without the need of an exhaustive and laborious research, consent entails permission given by a competent person

[44] In this instant case, there is no evidence to show that the plaintiff gave a clear and unmistakable consent which tantamount to an express consent for the trust deeds to be disclosed. Hence, the condition precedent as stipulated in s. 126 was never met. (See: *Yeoh Ah Tee v. Lee Chuan Meow* [1962] 1 LNS 210; [1962] MLJ 413).

[45] As to the reliance on implied consent under s. 128 by learned counsel for the defendants, we also find it to be without any merit.

[46] Section 128 reads:

> If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in section 126; and if any party to a suit or proceeding calls any such advocate as a witness, he shall be deemed to have consented to the disclosure, only if he questions the advocate on matters which but for such question he would not be at liberty to disclose.'

[47] An implied consent has to be 'inferred from one's conduct rather than from one's direct expression'. In this case, learned counsel for the defendants argued that there was evidence. However, his reliance on s. 128 appears to be misconceived. There are two limbs in s. 128. Learned counsel is relying on the second limb, that is, '... if any party to a suit or proceeding calls any such advocate as a witness, he shall be deemed to have consented to the disclosure, only if he questions the advocate on matters which but for such question he would not be at liberty to disclose.' But even in the second limb, there are also condition precedents stipulated. Firstly, the client must be the party calling the advocate as a witness in a suit or proceeding. Secondly, the client 'questions the advocate on matters which but for such question he would not be at liberty to disclose'.

[48] In the Magistrate's Court case, the plaintiff did not call the first defendant as a witness. He was the defendant in that suit. He gave evidence on his own behalf. Thus, even the first condition precedent was not satisfied. And although counsel for the plaintiff in that case cross-examined the first defendant it was not within the ambit of the second limb of s. 128. Indeed, based on the submission of learned counsel for the defendants, the learned Magistrate was only concerned on the point of pleading and not on client legal privilege issue. In fact, it was the plaintiff when questioned earlier on refused to answer about the trust deeds on the ground of client legal privilege.

[49] Meanwhile, the Court of Appeal found there was a disclosure when it said this:

> It is important to note that the plaintiff in a civil suit Magistrates Court *vide* Summons No. 72-3437-2009 had by himself disclosed the existence of the Trust Deeds.

[50] Unfortunately, there was no discussion or analysis on whether the Court of Appeal was relying on s. 126 or s. 128 in coming to such a finding.

[51] In respect of the other points raised by learned counsel for the defendants in his submissions such as the plaintiff did not disclose all material facts when he applied for an interim injunction and that he came to court with unclean hands thereby the balance of convenience should be to refuse an injunction as prayed for, we find that these points are not relevant in answering any of the leave questions. And even if we were to deal with each of them, our findings would not make any difference to our conclusion in this appeal.

Conclusion

[52] Our answer to leave question 1 is that in respect of the first part it is in the affirmative and for the second part it is in the negative. Our answer to leave question 2 is in the negative. For leave question 3 our answer is in the affirmative and for leave question 4 our answer is also in the affirmative.

[53] In the upshot, we allow with costs this appeal and set aside the judgment and orders of the Court of Appeal. We hereby make the following orders:

(a) An injunction to restrain the defendants from disclosure and use of the trust deeds in their possession;

(b) All copies of the trust deeds in the possession of the defendants be delivered up to the plaintiff within seven days from the date hereof;

(c) The defendants are not to retain any facsimile or photocopy of the trust deeds; and

(d) An order for damages to be assessed by a High Court Judge in Penang and paid by the defendants to the plaintiff.